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Supreme Court, U.S.
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No. 88-1031

In The

Supreme Court of the United States

October Term, 1988

CITIBANK, N.A.,

Petitioner,

v.

NGOC QUANG TRINH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS RESTATED

1. Whether the Supreme Court should grant certiorari based upon an issue that was not specifically preserved in the Court of Appeals.

2. Whether a Uniform Federal Rule of decision should apply to a contractual dispute between private parties in which the Federal interest is speculative and remote in possibility.

3. Whether a simple waiver executed by foreign Branch depositors would avoid liability being placed on the U.S. Parent Bank.[1]

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[1] Rule 28.1 of the Supreme Court is not applicable to Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This Court is being asked to review a judgment against Petitioner International Bank in the amount of $1403.67 plus pre-judgment interest of $1792.69 for a total of $3196.36. The following unbiased rendition of the facts in this case is taken verbatim from Judge Gilmore's opinion in the United States District Court Eastern District of Michigan who heard this case without a jury in August of 1985. *Trinh v. Citibank,* 623 F. Supp. 1526 (E.D. Mich. 1985).

> On July 25, 1974, Quang Quy Trinh, plaintiff's father, opened a "Golden Pass Book Account" at Citibank, Saigon, a branch of defendant Citibank, N.A. The account was a joint account in his name and the name of his son, Trinh. The initial deposit was of two million piasters. On October 25, 1974, Trinh's father made a deposit of million piasters.
>
> At the time Trinh's father opened this account, Trinh was a student in Michigan. He never returned to Vietnam. He became a United States citizen in 1979. Trinh testified that his father told him about the account and that he understood the account was for him and for his education.
>
> On April 24, 1975, Citibank Saigon closed its operations, leaving its keys at the U.S. Embassy. American and Vietnamese employees of the bank fled the country. On April 30, 1975, the South Vietnamese government in Saigon fell. On May 1, 1975, the revolutionary forces announced their victory and the creation of a Provisional Revolutionary Government.
>
> Shortly after the fall of Saigon, plaintiff's father was placed in a re-education camp. After his release in 1980, he sent the Citibank Saigon passbook to his

son in Michigan. In May 1980, Trinh called the International Division of Citibank in New York to inquire about the deposit. Trinh was told that the National Bank of Vietnam was now responsible for the deposit. On November 5, 1980, Trinh wrote to Walter Winston, chairman of Citibank, expressing dissatisfaction with this reply, and K.S. Lee, of Citibank, replied on November 17, 1980 that the National Bank of Vietnam was responsible for the Golden Passbook deposit.

See Pet. Appendix C pp. 37a-38a.

This case is in all material respects factually identical to and relies as legal precedent upon a case decided almost eight years ago by the Court of Appeals for the Second Circuit. *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2nd Cir. 1981), *cert. denied*, 459 U.S. 976 (1982). A total of seven Federal Judges in the 2nd and 6th Circuits have held that New York International Banks operating as branch banks in Saigon, Vietnam at the time of the Communist insurgency and the pull-out of American commerical and military interest (1975) remain liable to their branch-depositors in the United States. There was one dissent in this case in the 6th Circuit Court of Appeals.

This is not a sudden or revolutionary pronoucement. Rather, it is the application of Judge Cardozo's famous opinion in *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924). As the district court put it in this case:

> "[Sokoloff] established the principle that the home office is liable on a deposit placed in its foreign branch when the branch has wrongfully failed to return the deposit." (623 F.Supp. 1526; App. C to Pet., pp. 38a-39a).

See Vishipco, Sokoloff, and most recently *Edelmann v. Chase Manhattan Bank, N.A.,* 856 F.2d 322, 335 (1st Cir. 1988). *Sokoloff* has provided the basic rule for decision of these issues of branch liability since it was handed down. In that sense, uniformity of law is already present as a result of the wide acceptance of *Sokoloff.*

It is noted above that just last year (1988) the principles of *Sokoloff, Vishipco* and *Trinh* were applied in the 1st Circuit. In *Edelmann,* supra, certificates of deposit were placed in Chase Manhattan branch bank in Havana in 1958 just before Castro gained complete control of the island and the 1st Circuit held that under the circumstances Chase Manhattan and not the depositors bore the risk of the deposits being expropriated. Judge Wisdom in *Edelmann* aptly and succinctly stated the principles of *Sokoloff, Vishipco,* and *Trinh* as follows:

> *Sokoloff* is distinguishable on the facts from the instant case, but its underlying premise is apposite here. When a branch is closed, the depositor has a claim against the parent bank: the situs of the debt represented by the deposit "springs back" to the home office. Ultimate liability for the debt of a branch rests upon the parent bank. *Edelmann,* 856 at 335.

Despite petitioner's efforts (See Pet. p.6) the case of *Wells Fargo Asia Limited v. Citibank N.A.,* 852 F.2d 657, 659 (2nd Cir. 1988) is not a companion case of *Trinh* or the progeny of *Sokoloff* and *Vishipco.* The depositor in *Wells Fargo* was able to recover against the parent bank in New York due to specific language in the agreement with the parent bank that was not present in this case or *Vishipco.*

The following issues were advanced and failed by the New York Banks in *Vishipco* and *Trinh*:

ISSUE	*LAW APPLIED*	*RESULT*
A. *VISHIPCO*		
1) Deposit Contract Precluded Recovery	New York	Recovery Allowed *CHASE* is liable
AFFIRMATIVE DEFENSES		
2) Vietnamese Govt is Successor in interest to *Chase* and assumes debt.	Vietnam	No Evidence
*3) Act of State Doctrine	Vietnam	Not supported by evidence
4) Impossibility of Performance and Force Majeur.	Vietnam	Not supported by the evidence
B. *TRINH*		
1) Deposit Contract Precluded Recovery *Affirmative Defenses*	**Vietnam	Recovery allowed Citibank liable
2) Assumption of Assets By national Bank of Vietnam	Vietnam	Not Proved
3) Force Majeur	Vietnam	Not Proved
4) Confiscation of Assets	Vietnam	Not Proved

* The Act of State Doctrine was advanced to the U.S. Supreme Court in *Chase* and Cert. was denied based on this issue alone. See Pet. p. 21. ** In *Trinh* Citibank produced the only expert testimony on Vietnam Law but lost on the application of the Law of Vietnam to the case.

Having failed in the above Petitioner seeks to advance a novel theory of applying either federal common law or pre-emption by federal statutes to defeat liability in this case. The theory is novel in the sense that federal common law has never been applied to this body of law that has been around since the Russian Revolution, See *Sokoloff*. The urgency upon which Petitoner advances this new theory is thwarted by the fact that 65 years have passed since Justice Cardozo wrote *Sokoloff* and the application of contract law to the relationship between a foreign depositor and the foreign branches of New York banks has not seen the collapse of the International Banking business.

REASON FOR DENYING THE WRIT

Central to petitioner's strategy in the lower Courts was to distinguish this case from Judge Mansfield's opinion in *Vishipco* by establishing that unlike *Vishipco*, the law of Vietnam was applicable to the deposit agreement in this case. Accepting Citibank's invitation, both the district Court and the 6th Circuit applied the law of Vietnam, but found the result reached by application of the law no different than the result reached in *Vishipco* by application of New York law. Under the facts in each instance the bank home office was liable to its foreign branch bank depositors when the foreign branch closed. For the first time in this case Petitioner advances the issue of the application of federal common law principles or the pre-emptive federal statutes and regulations. See Pet. pp. 12-13. One cannot blame Petitioner for trying because in reality they have nowhere to go. Certiorari

was denied in *Vishipco* based on the presentation of the Act of State Doctrine by the Solicitor General. Likewise, Petitioner was unsuccessful with this Act of State Doctrine in the 6th Circuit. All other issues are bound up in the facts of the case and there is uniformity in the 1st, (*Edelmann*, supra.) 2nd (*Vishipco*, supra.) and the 6th Circuits, this matter. Despite having nowhere else to go to, the Supreme Court is a Court of Review and does not spend time on questions that are being presented for the first time.

Assuming arguendo, that the Court does not deny the petition solely on the basis of failure to raise the issue below there are numerous other reasons enumerated below for this Court not to grant its extraordinary and discretionary jurisdiction.

A. THIS COURT DOES NOT REVIEW CASES BASED UPON QUESTIONS NOT PRESERVED IN THE LOWER COURTS

The trial record is void of any request by the Petitioner that the Lower Court interpret pre-emptive Federal Statutes and regulations and/or apply federal common law to find U.S. Banks not liable for the confiscations of deposits in ...eir foreign branch banks.

It is not necessary to wait until the case reaches the Supreme Court before requesting the application of federal common law or the application of pre-emptive federal statutes. In *Edelmann*, supra the Court rejected applying federal common law to the issue of expropriation of a foreign branch bank. The *Edelmann* Court stated:

> Nothing in the language of the statute that gives us jurisdiction (The Edge Act, 12 U.S.C. 632) would support the development of a federal common law response to the substantive issue in this case. *Edelmann* 856 F.2d at 325 N.14.

[See cases cited in *Edelmann* 856 F.2d at 325 N.14 that demonstate the application of federal common law or pre-emptive federal statutes are matters that are brought before Federal Courts lower than the Supreme Court.]

Petitioner makes note of 12 U.S.C. 461(b)(6)(1982) and 35 Fed. Reg. 2768 (1970) as establishing that U.S. banks are not responsible for the actions of foreign sovereigns. See Pet. pp. 7-8, 12-13 N.10 Petitioner argues here for the first time the notion that this could be considered a pre-emptive federal statute and regulation that would lead the Court not to apply the law of Vietnam or any state forum but to hold that the statute and Regulation [12 U.S.C. § 461(b)(6)(1982) and 35 Fed. Reg. 2768(1970)] demand pre-emption that would defeat the liability of the parent bank in the U.S. Again the record is void of this argument being made in the Lower Courts or any argument specifically asking for the application of federal common law.

The exact questions that the Petitioner and the U.S. Govern as Amicus Curiae raised below are attached hereto as Appendices A & B. The only question raised below that even remotely resembles the question raised before this Court is (iii) for the Petitioner. However, the arguments made on behalf of question (iii) support respondents contention that the issue of pre-emption of federal statutes or regulations or establishing federal common law in this area was not raised below. See Petitioners

arguments in support of (iii) attached hereto as Appendix C.

For the first time in this Court, Petitioner invites this Court to craft federal common law principles or else find pre-emptive federal statutes and regulations which upset the result reached by application of Vietnam law. This is all new, and the trial record contains nothing which would aid in review of such a claim, for the claim has never before been advanced or litigated in this case. As explained in *Duignan v. U.S.*, 274 U.S. 195 (1927):

> This Court sits as a Court of Review. It is only in exceptional cases coming here from the Federal Courts that questions not pressed or passed upon below are reviewed. 274 U.S. at 200.

Surely there is nothing about a $3,196.36 judgment on a deposit contract which justifies a departure from ordinary review of this case.

B. FEDERAL COMMON LAW PRINCIPLES ARE NOT APPLICABLE TO THE LITIGATION BETWEEN PRIVATE PARTIES IN THIS MATTER

As stated in many places and in many instances there is "no federal general common law" *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Federal common law not being general or common it has been created in instances that are "few" and "restricted" See *Wheelden v. Wheeler*, 373 U.S. 647, 651 (1962).

Federal common law is not applied to disputes in which the federal interest is "speculative" or "remote in possibility". See *Bank of American Nat. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29, 33-34 (1956). Federal common law

is appropriate in areas involving "uniquely federal interest". Pet. p. 13 citing *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988).

The following cases contained within the petition reveal the factual contrast between this matter and those few chosen disputes where federal common law has been applied due to the disputes direct impact on federal interests.

In *Texas Industries Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981) See Pet. p. 13, the Supreme Court declined to create federal common law to interpret the Sherman Act or Clayton Act as providing a right of contribution among joint-tortfeasors. No one can deny the unique federal interest in anti-trust matters. However, as *Texas Industries* reveals the unique federal interest by itself is not enough to allow the Federal Courts to create federal common law. The narrowness of the field of federal common law is spelled out clearly in *Texas Industries* as follows:

> Rather, absent some congressional authorizations to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, or our relations with foreign nations and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States are intimately involved or because the interstate nature of the controversy makes it inappropriate for state law to control. *Texas Industries*, 451 U.S. at 641.

1. "Right and obligations of the United States" Id.

This right is surely not implicated by the relationship between depositors and their banks. Federal Regulation of the Banking Industry in and of itself does not change the fact that Mr. Trinh and Citibank, N.A. are private citizens.

2. "Interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations" Id.

Again nowhere in the body of law encompassing parent bank liability when foreign branch deposits are expropriated is there found U.S. international relationships being implicated. Petitioner argues to the contrary but Petitioner's argument is based on speculation "What might happen if" speculation which does not directly impact federal interest.

3. Adimiralty Id.

Of course, there are no admiralty issues here.

In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) See Pet. p. 13. The Supreme Court found that the civil liabilities arising out of federal procurement contracts involved "uniquely federal interest" because these contracts are wrapped up in getting the "Governments work done." *Boyle* at 2514.

In *United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1977) See Pet. p. 13. The Supreme Court was not persuaded that a Uniform Federal Rule was necessary so as to give the U.S. government priority over other creditors in the administration of SBA or FHA loan programs.

Even controversies directly affecting the operations of federal programs although governed by Federal Law do not require uniform federal rules. *Kimball Foods* at 727-728.

In *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943) See Pet. p. 13 the Supreme Court said that the rights and obligations of the United States with respect to commercial paper must be governed by uniform federal rule. Again we draw this Courts attention to who the litigants are in *Clearfield* as opposed to this case as well as the direct impact the issue of the rights and obligations of the United States with respect to commercial paper has on the function of the Federal government.

In *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 N.6 (1972) The pollution of a body of water bounded by four states touches the basic interests of federalism so as to implicate federal common law.

The above cases all contained within Petitioners petition make clear the direct impact the controversy must have on the U.S. government before this Court deems it necessary to step outside the dictates of *Erie v. Tompkins* supra, and create a Uniform Federal Rule of Decision. The direct impact in this matter is negated by the 65 year history of *Sokoloff* and its progeny as well as the private nature of this dispute between private litigants.

Under the banner of uniformity, already present under the *Sokoloff* line of cases, Citibank really advocates a change of the result which produces home office liability in favor of a rule banning such liability. Whether termed "federal common law" or else some ill-defined federal pre-emption theory, Citibank wants relief from

the result of this case under *Sokoloff*. But there in no reason for this Court to initiate such a change and especially on the basis of Citibank's petition.

First is the matter of who should do the law making. The Court is being asked to enter a legislative thicket and redraft rules governing bank and depositior relationships. Assessment of the policy considerations underlying such a change is a task best left to Congress. Since *Sokoloff*, neither Congress nor this Court has seen the need for "federalization" of the principles of bank and depositor liability or alteration of the principles of law which have involved in this area in *Sokoloff* and other cases. Federal pre-emption ordinarily emanates from a Congressional declaration of intent. Here, there has been no such declaration.

Citibank offers no reason for this Court to fill any lawmaking void. World turmoil is assuredly not a recent phenomenon, and there is no argument that the decision in *Sokoloff* or *Vishipco* have leaped urgently to the forefront. Likewise, the dire consequences predicted for U.S. banks as a result of the decisions in *Sokoloff*, *Vishipco*, and this case, have not come to pass. By Citibank's authoritative report, at Pet., p. 2, U.S. foreign branch bank operations have continued to accept ever-increasing volumes of deposits and have done so despite the current state of the law.

The rule of federal law which Citibank proposes will not change preexisting law. Page 18 of the Petition prays for the following:

> "Consistent with federal law and policy, this rule should provide that a bank, *unless it has expressly*

> *agreed otherwise,* may not be held liable for deposits with its branch in a foreign country when the foreign government prevents the branch from repaying such deposits."

This is simply a reformation of the 6th Circuit's ultimate decision here. That court was of the view that, by full disclosure, banks could define the extent of home office liability and thus, by contract, control the scope of such liability. Citibank agrees that the scope of liability is to be determined by contract, but parts company with the Sixth Circuit in suggesting a preexisting presumption. Citibank would prefer to start with a presumption of no home office liability and have the presumption subject to such exceptions when the bank affirmatively assumes the liability.

Citibank's continuing willingness to define home office liability by reference to contract law principles undercuts its insistence on absolute uniformity and its demand for a federalized law of bank and depositor relationships. Even under Citibank's proposal, home office liability will ultimately be a subject of contract, as it is now. In the final analysis, Citibank seeks the writ in order to debate how to adequately disclaim or acknowledge liability ***as a matter of contract law*** which it still proposes to be the paramount rule of decision. This is not a wise use of the certiorari jurisdiction, much less a set of facts calling for a radical court-initiated preemption of a longstanding body of case law that began with *Sokoloff.*

C. A SIMPLE WAIVER EXECUTED BY FOREIGN-BRANCH DEPOSITOR WOULD AVOID THE CONSEQUENCES OF THIS CASE ON PETITIONER.

As the 6th Circuit Court of Appeals suggested in this case, See Pet. Appendix A p. 13a, a simple waiver of the Vietnamese depositors right to proceed against the petitioners home office would give a different result. This case was resolved in favor of Respondent based upon the interpretation of the deposit agreement pursuant to Vietnamese Law. Can Petitioner deny that its business name in all the unstable areas of the world does not give it an advantage because depositors quite rightly assume that their money in a New York bank is more secure than a bank in Saigon, Manila, Beirut, Tehran, Havana etc. Would not the honest and fair procedure be to make all such foreign depositors sign a waiver that clearly states that your money is no safer in our New York branch than in your local bank if your country expropriates our branch assets in your country. See Appendix D for Respondents example of a waiver that would relieve Petitioner of future liability and save this Court from changing 65 years of legal precedent beginning with Judge Cardozas' opinion in *Sokoloff*, supra.

CONCLUSION

The decision below is correct and conforms with the uniform view among the circuits on all the issues that have been fairly presented and not presented in this Court for the first time to wit the application of federal common law. Despite the unfairness, federal common law

has no application to this dispute between private parties that is factually bound by the terms of the deposit agreement between the parties. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATEMENT OF THE ISSUES

(i) Should a U.S. bank's home office be held liable for deposits at a foreign branch when the branch itself is discharged from liability both by contract and by governing law?

(ii) Has a U.S. bank ceased operation at an overseas branch "voluntarily" – and not as a result of force majeure – when it has done so in anticipation of an impending hostile takeover of the city in which the branch does business, as part of an evacuation organized by the U.S. Government, and to save its employees from imminent peril?

(iii) Will courts in the United States require that a U.S. bank suffer a loss twice for an expropriated foreign branch – once when the branch is confiscated and again when depositors of the former branch seek payment from the bank's head office instead of from the government that seized the branch's assets?

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1258

NGOC QUANG TRINH,

Plaintiff-Appellee,

v.

CITIBANK, N.A.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the home office of a U.S. bank should be held liable for the loss of a depositor in a foreign branch that closed during wartime conditions, in the face of an imminent invasion by hostile forces, and that was later confiscated by the new government, without regard to the fact that the deposit agreement placed the risk of such loss on the depositor.

2. Whether a foreign government that confiscates a foreign branch of a U.S. bank should be presumed to have taken the entire branch, or only the assets of the branch and those liabilities that the foreign government has explicitly said it has taken.

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CERTIFICATE OF SERVICE

APPENDIX D

WAIVER OF PARENT BANKS' LIABILITY IN THE EVENT THE COUNTRY WHERE BRANCH IS LOCATED EXPROPRIATES BRANCHS' ASSETS

I, depositor in **Citibanks'** foreign branch located in ___ understand that if my government in any way expropriates my assets held in **Citibanks** foreign branch bank then I understand that I have **no** remedy against **Citibanks'** Parent Bank in New York. Any remedies that might exist as a result of this expropriation are confined solely within the jurisdiction of my country.

_____

DEPOSITOR

(TRANSLATED IN THE LANGUAGE OF THE FOREIGN BRANCH COUNTRY)

_____